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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEVERLY MORROW, Individually and as Parent and Next Friend of Jane Ellen Morrow and James Andrew Morrow, and JOHN PATRICK MORROW,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the United States Court of Claims in this case should be reversed because it is in conflict with the decision of this Court in *Richardson* v. *Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971), in holding in the case at bar that opinions of non-treating physicians, who are not subject to subpoena at the administrative hearing and not available for cross-examination, may constitute "substantial evidence" to support a decision by an administrative agency depriving a public safety officer's widow and dependent children of statutory benefits conferred on them by Congress?

2. Whether the decision of the United States Court of Claims in this case should be reversed because it is in conflict with the long-standing decisions of this Court in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) and *Morgan* v. *United States,* 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938), in holding, in the case at bar, that it is not a denial of due process of law for the LEAA to rely upon evidence received by the hearing officer after the administrative hearing was concluded, and without affording the claimants a meaningful opportunity to address, meet, or cross-examine said evidence; and then use said evidence as the basis to deprive claimants of the benefits to which they were entitled as the widow and dependent children of a public safety officer killed as a result of a traumatic injury received in the line of duty?

3. Whether the decision of the United States Court of Claims in this case should be reversed because it is in conflict with the decisions of a number of U.S. Circuit Courts of Appeal which hold that it is a deprivation of due process of law in contravention of the Fifth Amendment for an administrative agency to rely upon the opinions of non-treating physicians, which are contradicted by the opinions of competent, treating doctors, as "substantial evidence" to support a denial of statutory benefits conferred upon claimants by Congress?

4. Whether the decision of the United States Court of Claims in this case should be reversed because it conflicts with decisions of this Court in *United States ex rel. Accardi* v. *Shaughessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), *Vitarelli* v. *Seaton,* 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012 (1959) and *Service* v. *Dulles,* 354 U.S. 353, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1957), which require that a court strike down any administrative agency's action in which it has failed to scrupulously observe regulations it itself has promulgated? One of the regulations LEAA failed to comply with in this case required the LEAA to resolve any reasonable doubt in favor of the payment of the statutory benefit conferred by Congress to the survivors of a public safety officer killed in the line of duty as a proximate result of a traumatic injury. The LEAA also failed to comply with the regulations which defined the terms "proximate cause" and "substantial factor".

5. Whether the Court of Claims incorrectly decided important questions of federal law which have not been, but should be settled by this Court, namely:

a. Should the Public Safety Officers' Benefit Act of 1976, 42 U.S. §3796, be interpreted to give the force of law to a legal opinion which interprets the statute and regulations promulgated thereunder in a way which contravenes the statutory purpose and which deprives the widows and surviving dependent children of public safety officers who are killed in the line of duty of benefits conferred upon them by Congress in said Act?

b. Whether the LEAA can deprive the widows and surviving dependent children of public safety officers who are killed in the line of duty as a result of a traumatic injury, of benefits conferred upon them by Congress in the Public Safety Officers' Benefit Act of 1976, by using as the basis for the denial of the claim,

opinions of experts who, unbeknownst to claimants, are not furnished all the relevant medical evidence prior to the formulation of their opinions?

LIST OF PARTIES TO THE PROCEEDING

All of the parties are shown in the caption of the case.

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REFERENCE TO THE OPINION BELOW

The decision, opinion and judgment of the United States Court of Claims in this case was rendered on April 22, 1981, and is found at 647 F. 2d 1099. A copy of said decision may also be found in Appendix A hereto, *infra,* at page A-1.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This case came before the United States Court of Claims on cross motions for summary judgment. The decision was rendered by the Court of Claims on April 22, 1981, after consideration of the administrative record in the case, the submis-

sions of the parties, and oral argument. The Court of Claims denied appellants' Motion for Summary Judgment and granted the Motion for Summary Judgment of the defendant-appellee.

Jurisdiction of the United States Supreme Court to review by Writ of Certiorari the judgment rendered by the Court of Claims in this case is conferred upon it by virtue of 28 U.S.C. §1225(1). The Petition for Writ of Certiorari will be filed within ninety days from April 22, 1981, the date of the decision of the Court of Claims in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The pertinent Constitutional provision involved is as follows:

Constitution of the United States, Fifth Amendment:

> "* * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The pertinent text of the Public Safety Officers' Benefits Act of 1976, Pub. L. No. 94-430-90, Stat. 1346 (1976), 42 U.S.C. §3796 *et seq.* is as follows:

> "In any case in which the Administration determines, under regulations issued pursuant to this part, that a public safety officer has died as a direct and proximate result of a personal injury sustained in the line of duty, the administration shall pay a benefit of $50,000 * * *."

Certain of the regulations promulgated by the LEAA pursuant to the Public Safety Officers' Benefits Act and the Commentary to said regulations are particularly pertinent to the issues in this case. Specifically, 28 C.F.R. §32.2 provides in language nearly identical to the Act:

> "In any case in which the Administration determines, pursuant to these regulations, that a public safety officer, as defined in §32.2(h), has died as the direct and proximate

result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 * * *."

The regulations further provide:

"§32.1 Purpose.

The purpose of this regulation is to implement the Public Safety Officers' Benefit Act of 1976 which authorizes the Law Enforcement Assistance Administration to pay a benefit of $50,000 to specified survivors of State and local public safety officers found to have died as the direct and proximate result of a personal injury sustained in the line of duty. The Act is Part J of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, et seq., as amended (Publ. L. 90-351, as amended by Pub. L. 93-83, Pub. L. 93-415, Pub. L. 94-430 and Pub. L. 94-503).

§32.2 Definitions.

* * *

(d) 'Direct and proximate' or 'proximate' means that the antecedent event is a substantial factor in the result.

(e) 'Personal injury' means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases.

(f) 'Traumatic injury' means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain.

* * *

§32.4 Reasonable doubt of coverage.

The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit.

* * *

§32.24 Request for a hearing.

* * *

(c) In conducting the hearing, the Administration representative shall not be bound by common law or statutory rules of evidence, by technical or formal rules of procedure, or by Chapter 5 of the Administrative Procedure Act, but must conduct the hearing in such manner as *to best ascertain the rights of the claimant.* For this purpose the representative shall receive such relevant evidence as may be introduced by the claimant and shall, in addition, receive such other evidence as such representative may determine to be necessary or useful in evaluating the claim. Evidence may be presented orally or in the form of written statements and exhibits. The hearing shall be recorded, and the original of the complete transcript shall be made a part of the claims record.

* * *

(e) If the representative believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence.

* * *

(g) The representative shall, within thirty (30) days after the hearing, make a determination of eligibility and notify the claimant of his determination. The notice of determination shall set forth the findings of fact and conclusions of law supporting the determination.

(h) A claimant determined ineligible may, within thirty (30) days after notification of the representative's determination, request the Administrator to review the record and the determination made by the Administration representative. The Administrator shall make the final agency determination of eligibility within thirty (30) days after receipt of the request. The notice of final determination shall set forth the findings of fact and conclusions of law supporting the determination."

The Commentary to the regulations pertinent to this case is as follows:

"COMMENTARY

* * *

§32.2(d). In determining whether an injury was a substantial factor in the officer's death, LEAA will make no presumptions with respect to the length of time between the injury and death. The claimant has the burden in all cases of showing that the injury was a substantial factor in the officer's death.

§32.2(e). * * *

Similarly, where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and died of a 'heart attack,' a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death. Prior to making this determination, LEAA will submit the claim file to a forensic pathologist for review. If appropriate, the opinions of other pathologists or cadiologists will be solicited. In those cases where LEAA cannot reasonably determine which factor—the heart condition of the personal injury—was the substantial causal contribution to death, it 'shall resolve any reaonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit.' Section 32.4.

* * *

§32.2(f). Climatic conditions include atmospheric conditions, such as dense smoke, as well as precipitation and intensely high or low temperatures."

A STATEMENT OF THE CASE AND THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Appellants, Beverly Morrow, Jane Ellen Morrow, James Andrew Morrow and John Patrick Morrow are the widow and surviving children who were dependents of public safety officer John C. Morrow. John Morrow had been a firefighter for the City of Evansville for seventeen years prior to his death.

On October 8, 1976, Mr. Morrow was engaged in fighting a fire in the course of his duties for the Evansville, Indiana Fire Department. Being one of the first firemen to arrive at the scene of the fire, he rushed into the burning building in an attempt to ascertain whether there were children trapped in the upstairs portion of the house. In so doing, he inhaled and was overcome by dense smoke at the scene of the fire. He collapsed and was rushed to St. Mary's Medical Center by ambulance. The diagnosis of the attending physician, Thomas E. Stamps, M.D., included smoke inhalation with early upper airway edema, and an extensive myocardial infarction, which was complicated by cardiac arrest.

Mr. Morrow was treated with steroids for the extensive erythema caused by the smoke inhalation. Further evidence of the extensive smoke inhalation was that he "exhibited upper airway wheezing and rhonchi".

On this point, the opinion of the court below in this case erred in quoting the incorrect analysis of the LEAA's General Counsel who stated "no edema was reported by Dr. Sterne at the time of the examination in the emergency room * * *." On the contrary, the evidence is undisputed that Mr. Morrow did in fact have objective signs of smoke inhalation, including edema,

and that the attending physician was Dr. Stamps, not Dr. Sterne.

John Morrow never recovered from the effects of this heart attack and he expired on November 16, 1976.

The court below further erred, in its statement of facts in its opinion, in stating Mr. Morrow suffered a second heart attack prior to his death on said date. The evidence is uncontradicted that he did not; rather he suffered from supraventricular tachycardia and respiratory distress syndrome as a result of the myocardial infarction precipitated by the smoke inhalation on October 8, 1976; he never sustained another myocardial infarction.

Prior to his death, he was transferred to Indiana University Medical Center in Indianapolis, where he was under the care of R. Joe Noble, M.D., an eminent cardiologist.

In support of their claim for public safety officer benefits, the appellants submitted medical evidence to the administrative agency from *all* of John Morrow's treating physicians, Doctors Noble, Stamps, Harris and Dycus, *all* of whom concluded that the myocardial infarction that John Morrow sustained and which resulted in his death was brought about by the episode of smoke inhalation he experienced while fighting the fire on October 8, 1976.

Specifically, Dr. Stamps' opinion was that even though Mr. Morrow had atherosclerosis, the trauma of the smoke inhalation was a substantial factor in bringing about his death and the smoke inhalation which Mr. Morrow sustained on October 8, 1976, contributed to his death in at least as great a degree as any other contributing factor.

Dr. Noble stated that he had "no doubt that the smoke inhalation was a 'substantial factor' in contributing to Mr. Morrow's acute myocardial infarction which eventually culminated in his demise."

However, after receiving these expert opinions of the treating physicians, the LEAA denied the appellants' claim on February 15, 1978.

On March 3, 1978, appellants requested, pursuant to 28 C.F.R. §32.24, an administrative hearing to reconsider the denial.

The administrative hearing in this case was held in Evansville, Indiana on May 24, 1978. After the hearing was concluded, the LEAA's representative, the hearing officer, sought out the opinions of a Dr. Dixon, a Dr. Thompson and a research chemist, Ernest Hughes. The physicians opined that the cause of Mr. Morrow's death was underling atherosclerotic heart disease. These doctors had no first hand knowledge of the facts surrounding Mr. Morrow's death and they never examined or treated Mr. Morrow.

The hearing officer, in her decision, which denied benefits to the appellants, expressly relied on the opinions of these experts who were employed by LEAA and sought out by the hearing officer on her own, as contained in letters sent to the hearing officer on June 13 and June 14, 1978.

These dates are critical because the record filed with the defendant's Motion for Summary Judgment in this case in the Court of Claims, for the first time disclosed to claimants that on June 14, 1978, none of the so-called expert witnesses upon whom the hearing officer relied had received all of the materials submitted by the claimants in support of their claim. Thus, it was not until *July* 14, 1978, that the hearing officer sent Dr. Dixon all the evidence submitted by the claimants. The record does not disclose when, if ever, such materials were submitted to Dr. Thompson, but he obviously did not have these materials at the time of his report dated *June* 14, 1978, as shown by the hearing officer's letter of *July* 14, 1978, stating that she had received these documents and forwarded them to Dr. Dixon, and presumably to Dr. Thompson, at a later date.

In a letter dated June 22, 1978, William F. Powers, the administrator of the public safety officer benefit program for the LEAA, acknowledged that "at our request" the hearing exhibits and transcripts were received by Dr. Thompson, that they, the LEAA, agreed with Dr. Thompson's opinion, which was adverse to plaintiffs' claim, and the letter ends with an instruction to the hearing officer to affirm the agency's original denial of benefits.

The regulations do not provide the claimants the opportunity to object to or cross examine this evidence which is received through *ex parte* proceedings conducted by the hearing officer, after conclusion of the hearing, without notice to claimants.

After the claimants were informed on August 17, 1978, of the hearing officer's decision affirming the agency's initial denial of benefits, on September 6, 1978, pursuant to the applicable regulation, 28 C.F.R. §32.24(h), the appellants requested that the administrator of the LEAA review the decision of the hearing officer.

By letter of January 3, 1979, the appellants were informed by Henry Dogin, Deputy Administrator of the LEAA that the final agency determination in this case was to deny public safety officers benefits to plaintiffs and that the agency had adopted the hearing officer's decision as its final agency determination.

It is from the final agency determination that the lawsuit in this case arose in the United States Court of Claims.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This case presents a number of serious questions concerning the right of claimants to procedural due process in proceedings before an administrative agency which should be settled by this Court.

The very important Act of Congress, the Public Safety Officers' Benefit Act of 1976, 42 U.S.C. §3796, has never been interpreted or construed by this Court.

Under *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970), a statute such as the Public Safety Officers' Benefit Act that bestows an "entitlement" to a benefit must do so in accordance with the dictates of the due process clause of the Fifth Amendment to the Constitution of the United States.

Important questions of due process of law were raised by the claimants before the court below, but the Court of Claims did not choose to discuss these constitutional issues in its opinion, but relegated them to a short footnote at the end of its opinion, concluding that they were "without merit".

A.

The Decision Of The Court Of Claims Upholding The LEAA'S Denial Of Benefits In This Case Not Only Conflicts With The Applicable Dicision Of This Court In *Richardson* v. *Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971), But Also Its Decision Is In Conflict With Decisions Of A Number Of Federal Circuit Courts Of Appeal, Because The Denial Of Benefits Was Based Upon Medical Opinion Evidence Of Non-Treating Physicians Whose Identities Were Unknown To The Claimants At The Time Of The Administrative Hearing, Who Were Not Subject To Subpoena And Cross Examination By Claimants At The Administrative Hearing And Whose Opinions Were Directly Contradicted By The Opinions Of All The Competent Treating Doctors.

(Issues 1, 3 and 5B).

In *Richardson* v. *Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971), this Court held that a written report by a licensed physician who had examined a claimant for social security disability benefits may constitute "substantial evidence" supportive of a finding of the hearing officer adverse to the claimant, despite its hearsay character, but only if the author of the report was known to the claimant prior to the administrative hearing and was subject to subpoena so he could be called to the hearing by the claimant for cross-examination. The essence of this Court's holding in *Richardson* was the requirement that the author of the report be known to the claimant prior to the hearing so that the claimant could subpoena the doctor who wrote the report and cross-examine him at the hearing.

In *Richardson,* the ability of the claimant to cross-examine the doctor who made the report that was adverse to the claimant at the administrative hearing obviated the hearsay character of the report and the inability of the claimant to cross-examine the written report itself.

Unlike *Richardson,* in the case at bar, the reports of the physicians upon which the agency based its decision to deny public safety officer benefits to appellants cannot be said to be "substantial evidence". The physicians who prepared the reports in question in *Richardson* had examined the claimant. In the case at bar, the doctors never examined or treated the decedent, Mr. Morrow.

More importantly, in the case at bar, the hearing officer solicited the reports containing the expert opinions from Dr. Dixon and the research chemist Hughes *after the hearing,* without notice to the appellants. Also, the report from Dr. Thompson was received into the record by the agency *after the hearing without notice to the appellants.* Therefore, unlike the *Richardson* case, the claimants could not possibly have sub-

poenaed these people to the administrative hearing and cross-examine them, since they did not know their identities beforehand or that they would be submitting reports after the hearing was concluded.

Critical to the holding of this Court in *Richardson* that the procedure of accepting hearsay reports from non-treating physicians and allowing them to constitute substantial evidence supporting a denial of benefits to a claimant, was the fact that the reports themselves were in the record *prior* to the hearing and available for inspection by the claimant and his counsel. This Court noted in *Richardson* that:

> "The matter comes down to a question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of consultants' reports, *subject as they are* to be material and *to the use of the subpoena and consequent cross examination* * * *.
>
> It is clear and workable and does not fall short of procedural due process." (Our emphasis). *Richardson* v. *Perales, supra,* 402 U.S. at 411, 91 S.Ct. at 1431.

Subsequent to *Richardson,* a number of federal Courts of Appeal have held that opinions of doctors who have never examined a claimant or have examined a claimant only once are entitled to little weight and cannot constitute "substantial evidence" to support a denial of benefits, especially when contradicted by the opinion of a competent, treating physician. *Carver* v. *Harris,* 634 F. 2d 363 (7 Cir. 1980); *Allen* v. *Califano,* 613 F. 2d 139, 145 (6 Cir. 1980); *Hancock* v. *Secretary of Department of H.E.W.,* 603 F. 2d 739, 740 (8 Cir. 1979); *Hepner* v. *Matthews,* 574 F.2d 359, 362 (6 Cir. 1978); *Allen* v. *Weinberger,* 552 F. 2d 781, 786 (7 Cir. 1977).

In the case at bar the sole basis for the denial of benefits to claimants was the opinions of the nontreating physicians that

the smoke inhalation suffered by John Morrow was not a substantial factor in his death, which opinions were directly contradicted by the opinions of the competent treating physicians, Dr. Stamps and Dr. Noble.

Furthermore, the opinions of Doctors Dixon and Thompson used by the hearing officer as the basis for the denial of benefits to appellants are entitled to very little weight because the record is clear and uncontradicted that the opinions contained in the letter of Dr. Dixon dated June 13, 1978, and Dr. Thompson dated June 14, 1978, were formulated by them prior to their receiving all of the evidence submitted by the claimants in support of their claim, including the statement of Dr. Stamps, one of the treating physicians, and a substantial portion of the extensive lay and scientific evidence in this case.

This Court should grant the instant Petition for Certiorari in order to resolve the conflict between the decision of the Court of Claims in this case and the decisions of the Sixth, Seventh, and Eighth Circuit Courts of Appeal, cited above, and in order to reaffirm that this Court's decision in *Richardson* v. *Perales* does not allow an agency to support its denial of benefits to a claimant on the basis of reports from medical experts who have not examined or treated the decedent and whose identities were not known to the claimants prior to the submission of the reports and were therefore not subject to cross-examination at the hearing.

B.

The Court Of Claims Has Decided An Important Question Of Procedural Due Process In This Case In A Way Which Conflicts With The Applicable And Long-Standing Decisions Of This Court

(Issue 2)

This case presents an opportunity for this Court to consider the question of the propriety, under the due process clause of

the Fifth Amendment to the Constitution of the United States, of the regulations of a federal administrative agency which allow the supposedly impartial administrative hearing officer to solicit, compile, and receive evidence *ex parte,* after the administrative hearing is concluded without notice to the claimant, and without giving a meaningful opportunity to the claimant to be heard thereon, which evidence is then used by the hearing officer as the basis for the denial of the claim.

In this case, the implementing regulations of the Public Safety Officers' Benefit Act of 1976, 42 C.F.R. §32, establishes the procedure whereby the hearing officer can at his discretion solicit and receive evidence from the agency itself which initially denied the claim, and from third parties, after the administrative hearing is concluded. However, the regulations do not provide any procedure or method by which the claimant can meaningfully object to, cross-examine, or be heard upon or respond to in any fashion the evidence that is submitted post-hearing.

The inherent unfairness of this procedure is particularly evident where, as in the case at bar, the evidence so received after the hearing becomes the sole basis for the agency's denial of the claim.

In both *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) and *Morgan* v. *United States,* 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938), this Court held that an agency's reliance upon evidence received *ex parte* and considered without notice and without affording the parties affected an opportunity to address, meet, and rebut it was a denial of due process of law.

In upholding the decision of the LEAA to deny benefits in this case, the Court of Claims effectively sanctioned the *ex parte* procedure used by the hearing officer to receive the evidence which led to the denial of the benefits. The statement of the Court of Claims in its opinion that "claimants had complete

discretion to enter relevant materials" into the record and the argument advanced by the government before the court below that the claimants had the right to subpoena whomever they wanted to the hearing to testify evades this crucial constitutional issue. Because claimants were not informed of the identities of those from whom the hearing officer would solicit or receive expert and medical opinion evidence after the hearing was concluded, claimants could not subpoena any other witnesses or present other medical testimony, especially since the medical evidence they did submit clearly and overwhelmingly established their entitlement to the benefit.

The argument advanced by the government in the court below that the claimants failed to raise the procedural irregularities before the administrative agency and have therefore waived the issue is unsubstantiated and not well taken. First, the only procedure for the plaintiffs to obtain review of the hearing officer's decision is that set out in the administrative agency's regulation, 28 C.F.R. §32.24(h). This section provides that the only remedy afforded to claimants after a determination of ineligibility by a hearing officer is to "request the Administrator to *review the record* and the determination made by the Administration representative." (Our emphasis).

Therefore, the agency's administrative procedure does not provide for additional objections by claimants after the hearing or for the reopening of the hearing for cross-examination of the sources of the additional evidence submitted after the hearing, nor are such objections or the reopening of the hearing authorized by the regulation.

Therefore, the authorities cited by the government in the court below are not applicable, because under the governing regulations, it was impossible for claimants in following those regulations to do anything else but send in their request for review. This is precisely what the appellants did in conformance with the regulations.

Therefore, appellants did not waive their claim and the entire argument of the government must fail since it is premised under the false assumption that administrative remedies to raise the due process claim were available.

Second, the law is clear that administrative agencies have neither the authority nor the competence to pass upon constitutional questions involving their own procedures and regulations. *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, 539, 78 S.Ct. 446, 450-451, 2 L.Ed. 2d 470 (1958); *Buckeye Industries, Inc.* v. *Secretary of Labor,* 587 F. 2d 231 (5 Cir. 1979); *Speigel, Inc.* v. *F.T.C.*; 450 F. 2d 287 (7 Cir. 1976); *Dowen* v. *Warner,* 481 F. 2d 642 (9 Cir. 1973); *Finnerly* v. *Cowan,* 508 F. 2d 979 (2 Cir. 1974).

Third, and most important, it was not until the administrative record was prepared and filed in the court below that claimants learned that Dr. Dixon and Dr. Thompson had not received all the materials submitted by claimants in support of their claim prior to rendering the opinions set forth in Dr. Dixon's letter of June 13 and in Dr. Thompson's letter of June 14, upon which the hearing officer relied in denying benefits to appellants.

In the case at bar, the oral hearing was conducted on May 24, 1978, at Evansville, Indiana, where the claimants-appellants reside.

At the hearing, the hearing officer did not indicate to the claimants or their counsel: 1) that she would unilaterally solicit and receive other expert medical opinion evidence on the cause of death of fire-fighter Morrow; and 2) that she would receive, after the hearing, expert opinions of doctors employed by the LEAA; and 3) that she would solicit and receive such expert opinions *before* submitting all the relevant medical evidence in the record to them and base her dicision on such opinions. record to them and base her decision on such opinions.

In fact, after the hearing on June 1, 1978, without notice to appellants, the hearing officer on her own initiative solicited

certain opinions concerning the medical evidence in the case and on the cause of firefighter Morrow's death from Dr. Douglas S. Dixon, at the Armed Forces Institute of Pathology in Washington, D.C. Dr. Dixon replied to her in a letter dated July 26, 1978.

On June 22, 1978, William F. Powers, the Director of Public Safety Officers Benefits Program for the LEAA submitted a report from Dr. Robert L. Thompson, also from the Armed Forces Institute of Pathology. Dr. Thompson's opinions were also received into the administrative record after the hearing, without notice to the appellants.

In July, 1978, without notice to the appellants, the hearing officer solicited certain expert opinions from Ernest C. Hughes, a research chemist, which were also made part of the administrative record.

The hearing officer's decision, which was adopted without revision, *in toto,* by the LEAA as its "final agency determination" in this case, relies exclusively on the opinions of Dr. Dixon and Dr. Thompson dated June 13 and June 14 respectively, to support its decision to deny benefits to the appellants.

At the time of the hearing, the identities of these experts were not known to claimants, so it was impossible for them to subpoena them to the hearing for cross-examination. The opinions of these doctors were in direct conflict with the opinions of Mr. Morrow's treating physicians who concluded that the traumatic injury, smoke inhalation, sustained by firefighter Morrow was a substantial factor in his death and that it contributed to his death in at least as great a degree as any other factor.

Therefore, the entire evidentiary basis relied upon by the hearing officer and the agency in reaching the decision to deny benefits to appellants was submitted *ex parte* into the record without notice to the appellants and without proving them a meaningful opportunity to object to, cross-examine, or be heard thereon.

The appellants had no notice or knowledge that these reports were part of the administrative record until receiving a copy of the hearing officer's decision to deny them benefits, after it had been rendered.

Although apparently permissible under the applicable regulations, the procedure followed by the hearing officer in this case was grossly unfair to claimants and operated to deny them due process of law as guaranteed to them by the Fifth Amendment to the Constitution of the United States, as determined by this Court in the *Goldberg, Ohio Bell Telephone Company,* and *Morgan* cases, cited above.

As this Court stated in *Morgan* v. *United States, supra,* 58 S.Ct. at 775, "The requirements of fairness and due process are essential to the maintenance of public confidence in the value and soundness in administrative process."

Thus, this Petition for Writ of Certiorari affords this Court the opportunity to insure that the principles of procedural due process and fundamental fairness will continue to be guaranteed to claimants before federal administrative agencies, such as the widow and the surviving children of firefighter Morrow in this case.

C.

The Court Below Refused To Follow The "Accardi Doctrine" Which Requires That An Administrative Agency Must Scrupulously Observe The Rules, Regulations, And Procedures It Establishes Which Govern The Rendition Of Its Decision.

(Issue 4)

The "Accardi doctrine", first pronounced by this Court in the *United States ex rel. Accardi* v. *Shaughessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed 681 (1954) and subsequently followed in *Service* v. *Dulles,* 354 U.S. 353, 77 S.Ct. 1152, 1 L.Ed. 2d 1403

(1957) and *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012 (1959) requires a court to strike down administrative agency action in which the agency has failed to scrupulously observe the rules and regulations it itself has promulgated. The doctrine applies even in those instances where the action or the decision to be rendered by the agency is one given to its discretion. In the case at bar, the court below refused to apply the *Accardi* doctrine in regard to the agency's own implementing regulation, 28 C.F.R. 32.4, which requires that "any reasonable doubt arising from the circumstances of the officer's death" is to be resolved by the agency "in favor of the payment of the death benefit".

The purpose of the *Accardi* doctrine that requires federal agencies to abide by their regulations, even when those regulations are more generous than required by law, is founded in the principles of due process as guaranteed to all citizens of the United States by the Fifth Amendment to the Constitution of the United States. Binding an agency to its rules prevents unjust discrimination and prevents the denial of adequate notice to the proceedings by the agency in violation of due process. See *United States* v. *Newell*, 578 F. 2d 827 (9 Cir. 1979); *N.L.R.B.* v. *Welcome-American Fertilizer Company*, 443 F.2d 19 (9 Cir. 1971); *United States v. Heffner*, 420 F. 2d 809 (4 Cir. 1969).

In this case the decision of the hearing officer which was adopted as the "final agency determination," cited a legal opinion prepared by the agency's own lawyers which told the hearing officer it is sufficient to deny a claim if the denial is supported by "substantial evidence". This is directly contrary to the mandate of the agency's own regulation, 28 C.F.R. §32.4.

The requirements set forth in §32.4 of the regulations governs how the LEAA is to review the evidence submitted on a claim for payment of the Public Safety Officer Death Benefit. This regulation does not tell the hearing officer to review all the evidence and determine if "substantial evidence" exists to sup-

port the agency's initial determination to deny benefits. Rather, the agency's regulation *requires* that the agency "resolve *any reasonable doubt* arising from the circumstances of the officer's death *in favor of the payment of the benefits*". (Our emphasis).

This the agency failed to do in determining the issue of whether the smoke inhalation suffered by firefighter Morrow was the proximate cause of his death.

It has never been disputed in this case that smoke inhalation is "a traumatic injury" which, if found to be the proximate cause of death, would result in benefits being paid to the survivors. The agency so concluded in its initial determination in this case.

Therefore, under 28 C.F.R. §32.4, if there is "any reasonable doubt" in the administrative record as to whether or not the smoke inhalation was a proximate cause of John Morrow's death, the appellants should be paid the death benefit.

The lower court's opinion in the case at bar establishes the soundness of our contention.

The Court of Claims admitted in its opinion that "There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence." *Morrow* v. *United States,* 647 F.2d 1099, 1103 (Ct.Cl. 1981). This is exactly what we contend.

Since "there is no reasonable doubt" to this effect, then the agency admittedly failed to follow its own regulation.

If the government claims that the court below did not really mean what it said in the above quoted sentence, because the Court of Claims went on to state in its opinion that "The obvious and overwhelming cause of death was heart disease—pre-existing, prolonged, and degenerative.", *Morrow* v. *United States, supra,* the absurdity of this contention is shown by two undisputed facts.

First, all of the treating physicians, the only ones who examined Mr. Morrow and treated him before his death, all stated to the contrary; namely that the cause of death was not the heart disease, the atherosclerosis, but the trauma of the smoke inhalation.

Further, the absurdity of contending as the government does and as the court below may have held, that there is no reasonable doubt but that a smoke inhalation was *not* a substantial factor in fireman Morrow's death is shown by the decision of the Indiana Court of Appeals in the case of *American States Insurance Company* v. *Morrow*, ____ Ind. App. ____, 409 N.E. 2d 1140 (1980), *transfer denied*, which arose out of the same set of facts as does the case at bar. A copy of this decision is set out in Appendix B. to this Petition beginning at page A-9.

In that case, the issue was also whether or not the smoke inhalation suffered by firefighter Morrow was the proximate cause of his death. Without the benefit of such a favorable regulation as the "reasonable doubt" regulation, twelve jurors found that the smoke inhalation *was* the proximate cause of fireman Morrow's death, the learned trial judge so found in overruling the post-trial motions, three learned judges of the Indiana Court of Appeals so found in upholding the jury's verdict, and the five learned judges who comprised the highest court in the State of Indiana, its Supreme Court, also so found when they refused transfer and refused to set aside the opinion of the Indiana Court of Appeals in said case.

The complete lack of merit in this contention that there is no reasonable doubt that the smoke inhalation was not a substantial factor in fireman Morrow's death, is established by this truly overwhelming evidence.

The medical evidence in the administrative record submitted from all the doctors who treated Mr. Morrow, was unanimous that the smoke inhalation was a substantial factor in his death in at

least as great degree as any other factor, including and taking into account the underlying, asymptomatic condition of atherscleros is revealed by autopsy.

It is important to note that all the findings of fact of the hearing officer are based on either the opinions of Dr. Dixon or Dr. Thompson or of Ernest E. Hughes, the research chemist, all of whom did *not* see or treat Mr. Morrow nor did they have any first hand knowledge of the case whatsoever and were consulted by the hearing officer after the hearing. Claimants had no meaningful opportunity to respond to their evidence. None of the crucial findings of fact of the hearing officer are based upon the opinions of the primary treating physicians, Dr. Stamps and Dr. Noble, nor are any of the findings based upon any of the other information furnished to the LEAA and the hearing officer by the appellants in support of their claim!

Therefore, from even a cursory review of the administrative record, it is apparent that the LEAA and its hearing officer have not followed the mandate of 28 C.F.R. §32.4 to resolve any reasonable doubt in favor of the payment of the death benefit to the appellants and have denied due process to claimants.

This Court should grant the instand Petition for Writ of Certiorari and take the opportunity to reaffirm the vitality of the *Accardi* doctrine and to curb the disturbing propensity of the administrative agency to disregard its own regulations and deprive widows and dependent children of public safety officers of benefits conferred on them by Congress.

D.

The Court Of Claims Has Incorrectly Decided An Important Question Of Federal Law. It has Interpreted The Public Safety Officers' Benefit Act Of 1976, 42 U.S.C. §3796, Which Has Never Been Interpreted By This Court, To Allow A Legal Opinion Of The LEAA General Counsel To Deprive Widows And Surviving Dependent Children Of Public Safety Officers Killed In The Line Of Duty Of Benefits Conferred Upon Them By Said Statute.

(Issue 5a)

In denying Public Safety Officers' Benefits to appellants, the LEAA improperly relied on a legal opinion authored by its General Counsel, which defined the terms "proximate cause" and "substantial factor" in a way which was not only in conflict with the regulations, but also contrary to the statute itself.

This opinion directs the agency not to pay Public Safety Officers' Benefits unless the traumatic "injury contributed to the officer's death to as great a degree as any other contributing factor such as pre-existing, chronic, congenital or progressive disease." This legal opinion is set forth in full in Appendix D, *infra,* beginning at page A-30.

Despite its alleged avowal to the contrary in footnote four of its opinion in this case, *Morrow* v. *United States, supra,* 647 F.2d at 1103, the Court of Claims did adopt the LEAA General Counsel's definition of the term "substantial factor" when it stated in its opinion:

> "Since the smoke inhalation was not by itself sufficient to kill a fireman, nor did it contribute to the fireman's death to as great a degree as the pre-existing heart disease, it cannot be deemed to have been a 'substantial factor' in the fireman's death. Thus, proximate causation has not been established." *Morrow* v. *United States, supra,* 647 F. 2d at 1102.

Not only is this definition "cramped" as the Court of Claims recognizd in its opinion, but also this definition contravenes the statute and the decisions of This Court that an administrative rule which is inconsistent with the statute involved is invalid and a nullity. *Manhattan General Equipment Company* v. *Commission of Internal Revenue,* 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528, 531 (1936); *Rowan Companies, Inc.* v. *United States,* ____ U.S. ____; 101 S.Ct. 2288 (1981).

Since this Court has held that to be valid regulations promulgated by an agency must be in harmony with the applicable statute, *a fortiori* a "legal opinion", issued with less formality than a regulation, which contravenes both the statute and a regulgation promulgated thereunder is invalid and a nullity.

In the case at bar, the Public Safety Officers' Benefit Act of 1976, 42 U.S.C. §3796, and the applicable regulation, 28 C.F.R. §32.2 both provide for the payment of the Public Safety Officers' Death Benefit when the public safety officer dies "as the direct and proximate result of a personal injury sustained in the line of duty." Clearly the "legal opinion" of the LEAA General Counsel, relied upon by the agency in denying benefits to appellants, contravenes the Act and the regulation in directing the agency not to pay benefits unless the traumatic injury, which was smoke inhalation in this case, "contributed to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive diseases." This is simply not the generally accepted test of proximate cause. The Court of Claims has effectively approved this "legal opinion" and given it the force of law, even though it is inconsistent with and in violation of the Public Safety Officers' Benefit Act itself and the regulation promulgated thereunder.

The effect of this ruling is more far reaching than the opinion of the court below in this case portends. The Court of Claims relied upon its own opinion in the case at bar on the issue of proximate cause in deciding another case. In *Smykowski* v. *United States,* 647 F. 2d 1103, 1104, n. 3 (Ct. Cl. 1981), the Court of Claims pulls itself up by its own bootstraps when it stated that "The issue of proximate causation under PSOBA is addressed more fully in *Morrow* v. *United States,* Ct. Cl., 647 F. 2d 1099 (1981)." This files in the face of the opinion in the case at bar where the Court of Claims stated in footnote four that "We make no holding as to the propriety of LEAA General Counsel's particular construction of the term 'substantial factor' * * *". *Morrow* v. *United States,* 647 F. 2d at 1103, n. 4.

It is a denial of procedural due process for the agency to change the rules in the middle of the game by not faithfully following the statute and the regulations it itself has promulgated.

CONCLUSION

For all of these reasons, a Writ of Certiorari should issue to review the judgment and the opinion of the United States Court of Claims in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 382-79C

(Decided April 22, 1981)

BEVERLY MORROW, ET AL.
v. THE UNITED STATES

Robert L. Bartelt, Jr., attorney of record, for plaintiff. *Sydney L. Berger, Berger, Berger and Bartelt*, of counsel.

Virginia I. Bradley, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before COWEN, *Senior Judge*, KUNZIG and SMITH, *Judges*.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

Plaintiffs ("claimants") seek review by this court of the administrative denial of survivors' death benefits under the Public Safety Officers' Benefits Act of 1976, Pub. L. No. 94-430, 90 Stat. 1346 (1976), 42 U.S.C. §§ 3796-3796c (Supp. III 1979) ("PSOBA"). The case now comes before the court on the parties' cross motions for summary judgment. Claimants' decedent, a fireman, was afflicted by smoke inhalation while fighting a house fire. He collapsed from a heart attack the same day and died from a second heart attack six weeks later. The fireman's heart had apparently already begun to deteriorate prior to the smoke inhalation incident. LEAA determined that the smoke inhalation, *i.e.*, "traumatic injury", did not prox-

imately cause the fireman's death and that, consequently, a death benfit could not be paid. We concur.

I

PSOBA provides, *inter alia,* that "In any case in which the Administration [LEAA] determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 . . . one-half to the surviving . . . children of such officer in equal shares and one-half to the surviving spouse.. . ." 42 U.S.C. § 3796(a)(2) (Supp. III 1979); *accord,* 28 C.F.R. § 32.3 (1980). The implementing regulations state that, " 'Personal injury' means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases." 28 C.F.R. § 32.2(e) (1980).[1] The regulations further provide: " 'Occupational disease' means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation." 28 C.F.R. § 32.2(g) (1980). " 'Traumatic injury' means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, *climatic conditions,* infectious diseases, radiation, and bacteria, but excluding stress and strain." 28 C.F.R. § 32.2(f) (1980) (emphasis supplied). A "Commentary" which appears directly following the regulations in the Federal Register (but which does not appear in the Code of Federal Regulations) states that "Climatic conditions include atmospheric conditions, *such as dense smoke. . . .*" 42 Fed. Reg. 23260 (1977) (emphasis supplied).

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[1] The exclusion for occupational diseases should apparently be read as limiting the entire first clause of the regulation, rather than just the immediately antecedent clause thereof. *See Smykowski* v. *United States,* Ct.Cl. No. 288-79C, at 3 n.2 (slip opinion of April 22, 1981).

The regulations further indicate that " 'Direct and proximate' or 'proximate' means that the antecedent event is a substantial factor in the result." 28 C.F.R. 32.2(d) (1980). LEAA's General Counsel on September 12, 1977 issued a legal opinion to the PSOB Program, as follows:

> Generally, you should consider a traumatic injury a "substantial factor" in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive disease."

The "Commentary" states: "In determining whether an injury was a substantial factor in the officer's death, LEAA will make no presumptions with respect to the length of time between the injury and death. The claimant has the burden in all cases of showing that the injury was a substantial factor in the officer's death." 42 Fed. Reg. 23260 (1977).[2]

The "Commentary" also expresses the agency's viewpoint that deaths resulting from heart disorders, *i.e.*, "chronic, con-

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[2] The House Judiciary Committee Reports on H.R. 365 (firefighters) and H.R. 366 (public safety officers) noted the Committee's intent that the "direct and proximate result" requirement cover "those cases where the personal injury is a substantial factor in bringing about the officer's death." H.R. REPS. NOS. 94-1031 and 94-1032, 94th Cong., 2d Sess., 4 and 5, respectively (1976); *accord*, 42 Fed. Reg. 23260 (1977).

The "Commentary" indicates: "In applying terms such as 'direct and proximate result' or 'line of duty,' or in determining proof of relationship, the applicable State law will be considered, but will not be determinative. LEAA seeks to assure that eligibility will be determined by a uniform set of rules, regardless of where in the country the officer died or his beneficiaries reside. LEAA believes that the establishment of uniform rules and precedents best manifests congressional intent." 42 Fed. Reg. 23260 (1977).

genital, or progressive cardiac and pulmonary diseases," would not be covered by PSOBA "unless a traumatic injury was a substantial factor in the death."[3] *Id.* In *Smykowski* v. *United States,* Ct.Cl. No. 288-79C, at 4-5 (slip opinion of April 22, 1981), decided this date, we stated that LEAA's exclusion of "stress, strain, and heart disorders from the coverage of the Act [was] amply justified by the statutory language, legislative history, and medical statistics."

Lastly, the implementing regulations contain the provision that, "The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit." 28 C.F.R. § 32.4 (1980). The "Commentary" states: "In those cases where LEAA cannot reasonably determine which factor—the heart condition or the personal injury—was the substantial causal contribution to death, it 'shall resolve any reasonable doubt' " in accordance with the foregoing rule. 42 Fed. Reg. 23260 (1977).

II

The decedent, John C. Morrow, was a fireman with the Evansville, Indiana Fire Department. Morrow's crew was dispatched to fight a house fire on October 8, 1976. He became ill at the scene for a brief period, partially as the result of smoke inhalation, then continued to fight the fire. After returning to the fire station, Morrow again became ill and collapsed. He was taken to the hospital, where his illness was diagnosed as cardiac arrest. He was in the hospital 3½ weeks before being discharged. On November 16, 1976, he returned to the hospital after suffering severe chest pains at home. He was treated for 4 days before

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[3] The "Commentary" further indicates: "Prior to making this determination, LEAA will submit the claim file to a forensic pathologist for review. If appropriate, the opinions of other pathologists or cardiologists will be solicited." 42 Fed. Reg. 23260 (1977).

dying at the hospital on November 20, 1976. The diagnosis at autopsy was "marked" atherosclerotic heart disease. Evidence of an earlier healed myocardial infarction was noted. The death certificate listed the immediate cause of death as cardiac arrest due to myocardial infarction.

Claimants thereafter filed for PSOBA benefits. Prior to making its determination, LEAA sent the medical information in the file to Dr. Robert L. Thompson, Chairman of the Armed Forces Institute of Pathology, Department of Forensic Sciences, Walter Reed Hospital, for review. Dr. Thompson found no traumatic injury that might have contributed to Morrow's death. He found that the cause of death was "acute myocardial infarct secondary to arteriosclerotic heart disease." On February 15, 1978, LEAA issued an initial determination of ineligibility. The decision noted that "[a]n injury resulting from smoke inhalation is a traumatic injury under Section 32.2(f)." The decision continued: "On the basis of the evidence presented in this case, however, we have concluded that Firefighter Morrow's smoke inhalation on October 8, 1976, was not a substantial factor in his fatal myocardial infarction on November 20, 1976." Instead, "the overriding factor in his death was his severe underlying heart disease."

On March 3, 1978, claimants submitted a request for formal agency reconsideration of the initial denial. An oral hearing was held in Evansville on May 27, 1978. The hearing was then continued to permit further analysis of the data by medical and chemical experts. On August 15, 1978, the hearing officer issued a decision upholding the denial. The analysis was based upon the definition of "substantial factor" previously announced by LEAA's General Counsel. The salient points of the analysis were as follows:

(1) "Mr. Morrow was suffering from marked coronary arteriosclerosis before his cardiac arrest on 8 October 1976. The autopsy showed the presence of a previous, healed myocardial infarction."

(2) "The smoke inhalation which Mr. Morrow suffered at the scene of the fire along with the stress and strain of the event undoubtedly precipitated the acute infarct [of 8 October 1976]."

(3) "It can be assumed from [the] evidence and from the information contained in the referenced publications, that Mr. Morrow did inhale sufficient carbon monoxide to block off consciousness of his activities following his exit from the fire room, but since he later recovered full consciousness, and no edema was reported by Dr. Sterne at the time of examination in the emergency room . . . it can be assumed further that the effects of the carbon monoxide on his body were not sufficient to cause real respiratory problems."

(4) "The behavior of Mr. Morrow following the probable onset of his cardiac arrest—falling down stairs, loss of memory 'for the rest of the day,' living for an additional six weeks—suggests that the amount of smoke inhaled was not sufficient to cause real problems on a purely respiratory basis. His symptoms were primarily cardiac with chest pain and collapse."

(5) "[A]lthough Mr. Morrow probably inhaled enough carbon monoxide to have blocked out his memory of events following his departure from the bedroom in which the fire was located, and to have caused cardiac irregularities which contributed to the onset of cardiac arrest, the actual cause of death was the chronic, progressive, cardiovascular disease. Smoke inhalation effects were secondary and minor in comparison with the damage offered by the underlying, chronic disorder and did not, therefore, promote a 'traumatic injury' in this case."

The hearing officer's conclusion may be restated as follows. Since the smoke inhalation was not by itself sufficient to kill the fireman, nor did it contribute to the fireman's death to as great

a degree as the pre-existing heart disease, it cannot be deemed to have been a "substantial factor" in the fireman's death. Thus, proximate causation has not been established. Benefits cannot be paid.

On September 6, 1978, claimants appealed the decision of the hearing officer to the LEAA Administrator. On January 3, 1979, the Administrator adopted the hearing officer's decision as the final agency action. Claimants filed their petition in this court on September 17, 1979.

III

This court has held that it has limited authority in reviewing administrative decisions. Generally, such review is limited to determining (1) whether there has been substantial compliance with statutory and implementing regulations; (2) whether there has been any arbitrary or capricious action on the part of the Government officials involved; and (3) whether there was substantial evidence supporting the decision. *See, e.g., Urbina* v. *United States,* 209 Ct.Cl. 192, 197, 530 F.2d 1387, 1389-1390 (1976).

Claimants first allege a want of substantial evidence to support the agency's determination that smoke inhalation was *not* a "substantial factor" in Morrow's death. The allegation is baseless. The agency received extensive lay and scientific evidence and solicited several expert evaluations. Claimants had complete discretion to enter relevant materials. The resulting record thoroughly supports the agency's position.[4]

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[4] We make no holding as to the propriety of LEAA General Counsel's particular construction of the term "substantial factor"—which strikes us as somewhat cramped—since we do not believe that claimants herein can prevail under any plausible construction of the term. *See generally Udall* v. *Tallman,* 380 U.S. 1, 16 (1964).

Claimants next allege that the Administrator has failed to comply with the regulatory requirement that "any reasonable doubt arising from the circumstances of the officer's death [be resolved] in favor of payment of the death benefit." 28 C.F.R. § 32.4 (1980). The allegation, relating to the agency's finding upon the issue of proximate causation, is again without foundation. There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence. The obvious and overwhelming cause of death was heart disease—pre-existing, prolonged, and degenerative.[5]

IV

All other arguments raised by claimants, although not directly addressed in this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the administrative record and the submissions of the parties, with oral argument of counsel, plaintiffs' motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Plaintiffs' petition is dismissed.

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[5] Claimants have also made various constitutional allegations. They are without substance.

APPENDIX B

AMERICAN STATES INSURANCE
COMPANY, Appellant
(Defendant Below),

v.

Beverly MORROW, Appellee
(Plaintiff Below).

No. 1-1179A292.

Court of Appeals of Indiana,
First District.

Sept. 11, 1980.

Rehearing Denied Oct. 17, 1980.

ROBERTSON, Presiding Judge.

Beverly Morrow (Morrow) initiated this action against American States Insurance Co. (American States), when American States failed to pay according to a policy provision contained in group insurance policy issued to the City of Evansville, Indiana. The trial court found in favor of Morrow. We affirm.

Morrow's husband was a fireman with the Evansville Fire Department. He died as a result of a myocardial infarction (heart attack) which occurred due to smoke inhalation he experienced while fighting a fire within the course of his employment. Following his death, an autopsy revealed that the deceased also suffered from arteriosclerotic heart disease. Prior to the heart attack, however, Morrow's husband never experienced any symptoms associated with the disease and testimony revealed that he led a physically active life.

The coverage portion of the policy issued to the City of Evansville provided that payment would be made: "If any individual suffers a loss specified below, directly and independently of all other causes as a result of bodily injury effected solely through external violent and accidental means. . ." The policy also contained a limitation that benefits would not be paid for death or other loss resulting directly or indirectly "(g) from bodily or mental infirmity or disease in any form. . . ."

American States argues on appeal that: the trial court erred in denying its motions to dismiss, tendered both after Morrow's presentation of evidence and at the close of all the evidence; there was insufficient evidence to support the verdict and that it was contrary to law because the arteriosclerotic heart disease was a proximate cause of death and would therefore be excluded by the limitation on coverage, and; the trial court erred in reading three instructions tendered by Morrow, two of which dealt with proximate cause and one of which covered items admitted as true by American States.

[1] A directed verdict is proper only where some or all of the issues in the case are not supported by sufficient evidence or a verdict thereon is clearly erroneous. Indiana Rules of Procedure, Trial Rule 50; *Ortho Pharmaceutical* v. *Chapman,* (1979) Ind. App., 388 N.E.2d 541; *Keck* v. *Kerbs,* (1979) Ind.App., 395 N.E.2d 845. Also, when a party presents evidence on its behalf, any error in overruling a prior motion to dismiss is waived. *Orth Pharmaceutical* v. *Chapman, supra; American Optical Co., U.S.* v. *Weidenhamer,* (1980) Ind.App., 404 N.E.2d 606. From out review of the record, we find sufficient evidence to sustain the decision. There was no error in overruling American States's motions to dismiss.

The gravamen of American State's argument on appeal centers upon a determination of the proximate cause of death. American States contends that the arteriosclerotic heart disease suffered by Morrow's husband was a proximate cause of the myocardial infarction, even if it was not the *sole* proximate

cause. American States argues that therefore, the death was excluded from coverage. American States cites as support for this reasoning, testimony by the pathologist who performed the autopsy. The pathologist testified that based on a reasonable degree of medical certainty, Morrow's husband died of arteriosclerotic heart disease.

We do not agree with American States's reasoning. Basically, because of the conflicting testimony, much of what American States argues is a question of the sufficiency of the evidence to support the verdict, and given the well recognized standard of appellate reivew, we will view only that evidence most favorable to Morrow. In addition to the testimony cited by American States, there was further testimony that the ventricular tachycardia resulted from the smoke inhalation and the physical exertion required to fight the fire, and this precipitated the myocardial infarction. Even American States's own witnesses agreed that the smoke inhalation could have been a precipitating factor of the heart attack. Therefore, the question then becomes, given the conflicting testimony, whether the mere presence of arteriosclerotic heart disease, which might eventually result in death, is sufficient to bring the death within the limitation of the policy coverage. We do not believe that it is. This question is resolved by a determination of what is meant in such a situation by the proximate cuase of death.

Both parties cite *Prudential Insurance Co. of America* v. *Van Wey,* (1945) 223 Ind. 198, 59 N.E.2d 721, as authoritity for their positions although they reach opposite conclusions.

In *Van Wey,* the beneficiary's decedent developed hydrostatic pneumonia as a complication from medical treatment for a broken hip sustained in a fall. The insured died from the pneumonia, but the court recognized that the disease was the natural result of necessary treatment of the broken hip, which in turn was admittedly the result of a fall. In reaching the probable cause question, the court declared; "The fall set in motion the events which culminated in her death. The fall, therefore, was

the proximate cause of the insured's death and in determining liability in a case of this kind it is the proximate cause which is controlling." 223 Ind. at 202, 59 N.E.2d at 722 [Citations omitted].

The next question faced by the court in *Van Wey,* was whether the fall was effected through accidental means or whether the fall resulted directly or indirectly from bodily infirmity or disease. In *Van Wey,* the court found that the deceased had suffered recent spells of dizziness and weakness, and that therefore, the court could not say the fall resulted from solely accidental means. In this case, however, Morrow's husband never experienced any prior problems with his heart, and there was expert testimony that persons with worse arteriosclerotic heart disease often live much longer than Morrow's husband without experiencing any difficulty. Consequently, on this latter point, *Van Wey* is clearly distinguishable.

[2] The standard for proximate cause established by *Van Wey, supra,* however, is relevant to the case and consistent with holdings both in this state and other jurisdictions. In *Graham* v. *Police and Firemen's Ins. Ass'n.,* (1941) 10 Wash.2d 288, 116 P.2d 352, the Supreme Court of Washington declared that "where disease merely contributes to the death or accident, after being precipitated by the accident, it [the disease] is not the proximate cause of the death or injury, nor a contributing cause, within the meaning of the terms of the policy." 166 P.2d at 355. The Washington court further determined that the law does not require a person to be in perfect health at the time of the accident. We agree with this reasoning and find it determinative of the issue in this case. To require a person to be in perfect health at the time of the accident would be an absurdity, rendering the policy virtually useless. The critical question becomes what event set in motion, the chain of events leading to the death. For example, if a disease caused weakness and dizziness which resulted in a fall which resulted in a death, although the fall would be the proximate cause of death, a

showing of this prior medical history would reveal that in actuality, the disease set in motion the chain of events leading to the fall and the death. However, when there is no evidence of prior medical trouble and the disease appears latent or in a remedial stage, the fall itself may be found to have set in motion the chain of events resulting in the death. *See Brown* v. *Metropolitan Life Ins. Co.,* (1959) Mo., 327 S.W.2d 252, and cases cited therein; *Continental Casualty Co.* v. *LLoyd,* (1905) 165 Ind. 52, 73 N.E. 824; *Kokomo Life & Accident Ins. Co.* v. *Wolford,* (1929) 90 Ind.App. 395, 167 N.E. 156; *Carter* v. *Aetna Life Insurance Co.,* (1940) 217 Ind. 282, 27 N.E.2d 75.

[3] From our review of the record, we find sufficient evidence to sustain the jury's determination that the smoke inhalation was the proximate cause of Morrow's husband's death, and that the inhalation set in motion the chain of events which resulted in his demise. In *Continental Casualty Co.* v. *Lloyd,* 165 Ind. at 64, 73 N.E. at 828, our supreme court, defining proximate cause declared:

> The law will not go father back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes.

There was no error in the decision below which found the smoke inhalation to be the proximate cause of death, notwithstanding the deceased's arteriosclerotic heart disease.

[4] We next turn to the three instructions American States claims were given in error. The first instruction consisted of thirteen (13) facts which American States admitted as true in its response to Morrow's request for admissions. American States contends that the facts admitted do not tend to prove or disprove any fact at issue and were confusing and prejudicial to the jury. There is not citation to any authority for this proposition, and we see no merit in the argument. American States admitted the facts to be true. The instruction properly told the jury what facts had been admitted as true and that they were to accept the facts as true. The facts presented related directly to the action being tried and the policy at issue. There was no error.

[5-7] The next two objections relate to proximate cause. Both of American States's objections were that the instructions were an incorrect statement of Indiana law with respect to proximate cause. Morrow's instruction number three stated:

> An injury may be said to be the sole producing or proximate cause of death when it stands out as the predominating factor in causing death. An active, efficient force that sets in motion a train of events which brings about a result without the intervention of any force from a new and independent source may be regarded as the direct, proximate and sole cause of death.
>
> Therefore, if you find from a preponderance of the evidence, that the smoke inhalation sustained by John Morrow set in motion the train of events that solely resulted in his death, your verdict may be for the plaintiff, Beverly Morrow.

Instruction number four stated:

If you find from a preponderance of the evidence that John Morrow had a condition of arteriosclerosis which had developed prior to his death, you are instructed that if said condition merely contributed to his death, after being precipitated by accidental means, it is not a proximate cause of death.

It is only necessary that the plaintiff prove by a preponderance of the evidence that the accidental means, smoke inhalation sustained by John Morrow, was the sole direct and proximate cause of his death.

The fact that John Morrow may have had a preexisting condition or physical infirmity, arteriosclerosis, that was [a] necessary condition to his death does not alone deprive the accidental means of smoke inhalation of its distinction as the sole proximate cause of death.

It is clear that not all applicable principles of law need be stated in one instruction, and that the instructions must be read as a whole in order to glean their impact. *Grad* v. *Cross*, (1979) Ind.App., 395 N.E.2d 870. Based upon our above discussion of proximate cause and our reading of the other instructions given by the court on proximate cause, we find Morrow's instructions numbers three and four to be a correct statement of Indiana law as it relates to proximate cause and the language of the insurance policy at issue in this action.

Finding no error in the proceeding below, the judgment of the trial court is affirmed.

Judgment affirmed.

NEAL and RATLIFF, JJ., concur.

APPENDIX C

HEARING DETERMINATION
ON
APPEAL OF DENIAL
TO
PAY PUBLIC SAFETY OFFICER BENEFITS
TO
THE SURVIVOR OF JOHN C. MORROW

Hearing Conducted On 24 May 1978 In Evansville, Indiana
June R. Cornog - Hearing Officer
Gloria S. Crenshaw - Hearing Recorder
Sydney A. Berger - Counselor for Mrs. Beverly I. Morrow

AUGUST 15, 1978

HEARING DETERMINATION

This determination is made with respect to the claim of Beverly I. Morrow for benefits under the Public Safety Officers' Benefits Act of 1976 (hereinafter referred to as the PSOB Act). Mrs. Morrow's claim arose out of the death of her husband, John C. Morrow, Fire Fighter, in the city of Evansville, Indiana.

The initial LEAA review of this claim resulted in a determination on February 8, 1978 that claimant was not eligible for benefits. The Determination stated that:

> . . . the death of John C. Morrow is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796). Fire Fighter Morrow's death was not the direct and proximate result of a personal injury as defined by 28

> C.F.R. 32.2(d), (e) and (f). Specifically, a public safety officer's death which results from a chronic, congenital, or progressive cardiac and pulmonary disease is not covered by the Act unless a traumatic injury was a substantial factor in the death. . . . On the basis of evidence presented in this case, however, we have concluded that Fire Fighter Morrow's smoke inhalation on October 8, 1976, was not a substantial factor in his fatal myocardial infarction on November 20, 1976. We have determined, to the contrary, that the overriding factor in his death was his severe underlying heart disease. . . . His widow and children are not, therefore, entitled to the benefits authorized to be paid under the Act.

A request for reconsideration of the initial determination was submitted to LEAA by Robert L. Bartelt, of the firm of Berger and Berger, Attorneys and Counselors at Law, for Mrs. Morrow on March 3, 1978. An oral hearing on the case was conducted in Evansville, Indiana, on 24 May 1978. The claimant, Beverly I. Morrow, was represented at the hearing by Attorney Sydney A. Berger. Testimony for the claimant was presented by Arthur Steiner, District Chief, and Gary Wilhite, Chief, Evansville Fire Department. The following depositions were also supplied by the attorney: a sworn statement under oath by Thomas Edward Stamps, the physician who attended Mr. Morrow at the time of the myocardial infarct; two discharge summaries signed by Robert L. Harris, M.D., dated October 8, 1976 and Novmber 16, 1976; a Report by J. R. Waddell, physician, who acted as consultant at the time of Mr. Morrow's original cardiac arrest; an affidavit by Samuel L. Gates, Emergency Medical Technician for the Evansville Fire Department; and a "report" or statement of opinion by Dr. R. Joe Noble, attending physician at the time of Mr. Morrow's death, six weeks after the original onset of the myocardial infarct. These depositions and accompanying medical records were submitted for inclusion in the record.

In the light of the medical complexity of the testimony presented in both the record and the oral hearing, the hearing was continued to permit further analysis of the factual data by two medical experts not previously acquainted with the case and to obtain further information on smoke and smoke-related injuries from an expert analytical chemist who specializes in the analysis of fire-related gases. The medical experts were Dr. Douglas S. Dixon, Chief, Division of Forensic Pathology, and Dr. Robert L. Thompson, Captain, MC, USN, Chairman, Department of Forensic Sciences, both from the Armed Forces Institute of Pathology; the Analytical Chemist was Dr. Ernest E. Hughes, Research Chemist, Gas and Particulate Science Division, Center for Analytical Chemistry, National Bureau of Standards. Copies of the letters from Drs. Dixon, Thompson and Hughes have been included as References #4, 5, 6, 7 and 8 in the hearing materials.

On the basis of our review of the existing record, the testimony and exhibits entered at the hearing and the findings of the experts identified above, it is hereby determined that the initial determination should be upheld and that claimant is not eligible to receive benefits under the Act. This conclusion rests upon our analysis of the evidence presented, the PSOB Act, the relevant sections of the LEAA Regulations implementing the PSOB Act, and related Office of General Counsel (OGC) opinions interpreting these Regulations.

Specifically, Section 32.3 of the Regulations provides that PSOB benefits shall be paid "in any case in which the Administration determines, pursuant to these Regulations, that a public safety officer. . . has died as the *direct and proximate* result of a *personal injury* sustained in the line of duty. . ." (emphasis supplied) To assist in interpreting the type of injury qualifying for payment, Section 32.2(e) and (f) define, respectively, a "personal injury" as "any traumatic injury . . ." and a "traumatic injury" as "a wound or other condition of the body caused by external force. . . but *excluding stress and strain.*" To assist in defining the relationship between the injury and the death, Section 32.2(d) provides that

"direct and proximate". . . means that "the antecedent event is a *substantial* factor in the result." (emphasis supplied)

In recognition of the complexity of determinations concerning deaths arising out of heart-related conditions, a specific discussion of these issues is included in the Supplementary Information published as part of the Regulations. In relevant part, this discussion provides that:

> The definition of personal injury in the legislative history of PSOB and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude, however, that deaths resulting from chronic, congenital, or pogressive cardiac and pulmonary diseases are not covered by PSOB, *unless a traumatic injury was a substantial factor in the death.* . . .
>
> (W)here . . . (therefore) . . . an officer suffering from heart disease, such as arteriosclerosis, has sustained a *traumatic injury* and died of a "heart attack," a benefit will be paid *only if the injury is determined to be a substantial factor in the officer's death.* (emphasis supplied)

PSOB Legal Opinion 77-6 (September 2, 1977) further clarifies the types of fact findings necessary to support a claim for benefits resulting from "heart attack" related deaths and states that: "you should consider a traumatic injury a 'substantial factor' in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributed to the officer's death to as great a degree as any other contributing factor such as pre-existing chronic, congential, or progressive disease."

In light of the standards set out above, therefore, a finding in favor of payment of claims in connection with an on-duty heart-attack related death requires that medical evidence support the conclusion that a traumatic injury(s) - as distinguished from

related stress, strain, or anxiety - constituted as substantial a cause of death as any other factors existing at the time, such as, for example, a pre-existing cardiac condition.

Since, our review of the evidence, including Dr. Dixon's analysis of the record, indicates that such a finding cannot be made, it is our view that the original determination against claimant must be upheld consistent with standards set out in the Regulations.

The primary descriptive evidence offered in support of the claimant's position is contained in the testimony of Mrs. Beverly I. Morrow, of the men from the Fire Department, and depositions and consultation records from the attending physicians. A review of the statements contained in the testimony and depositions support findings that:

1. Fire Fighter Morrow, pulling the nozzle of a booster line and closely followed by Chief Wilhite who was also hauling on the line, climbed the stairs of a dwelling house to the bedroom where a fire was burning. Mr. Morrow immediately trained water on the flames. This act "produced all the smoke" (1, p. 32)* from burning mattresses and possibly curtains, carpet and plastic blinds as well. There was an air-conditioner in the window which was later shoved on through the window to the ground. Mr. Morrow was not wearing a Scott Pak.

2. Mr. Morrow remained in the room, or its vicinity, to continue fighting the fire and to look for possible occupants of the room, while Chief Wilhite returned to the truck to get Scott Paks for both of them. When Wilhite returned to the house he found that Mr. Mor-

* Numbers in parentheses refer to Reference list at end of the text, copies of references 2 through 9 are appended.

row was falling down the stairs (1, p. 35) and "he ended up at the bottom of the stairs." Mr. Morrow later told his wife he did not remember falling down the stairs or anything else "for the rest of the day". (1, p. 21).

3. Mr. Morrow, at the direction of Chief Steiner, later climbed up and down the stairs twice without help. After the second climb, while helping to throw some things out of the window, "he did bend over, put his hands on his knees and was coughing. . . (and said) I never had anything affect me this way." (1, p. 36). He did not, however, collapse until after his return to the fire station.

4. Mr. Morrow had experienced some minimal signs of possible heart disease prior to the infarct — he complained occasionally to his wife of "indigestion" (1, p. 15) and of "anterior chest pain discomfort" (2) but previous physical examinations had indicated no heart disorder.

5. Severe physical exertion was required to haul the booster hose up a flight of stairs while wearing full firefighting equipment of helmet, long jacket, boots, etc. The demands of such exertion on the body are enhanced by the presence of smoke and the accompanying reduction in oxygen level.

   The combustion of mattress materials (probably cotton) in the bedroom caused heavy smoke, which may have been contaminated further by the "leakage" of freon from a possible "rupture" in "a coil" of the air-conditioner or from the burning of plastic window blinds. (1, p. 33)

The major medical testimony offered in support of the claimant's position was provided by the office and hospital records of

Physicians John H. Sterne, Robert L. Harris, Ronald Waddell, Thomas E. Stamps and R. Joe Noble and by the Autopsy Report, No. A76-264, signed by Kathleen A. Warfel, Pathologist. Review of this evidence and the related exhibits by Physicians Douglas S. Dixon, Robert L. Thompson and Analytical Chemist Ernest E. Hughes, supports findings that:

1. Fire Fighter Morrow, who had had no previously recorded history of heart disease, suffered the major myocardial infarction on 8 October 1976 but lived another six weeks after the initial cardiac arrest; he died on 20 November 1976.

2. After the initial cardiac arrest, treatment included insertion of a pacemaker to regulate arrythmia of heartbeat. The device was removed after discovery that it did not help.

3. Aside from the deceased's own experience with "indigestion" and chest pains as reported by his wife (2) he had had no warning of heart disorder prior to the first cardiac arrest. His physical condition had been described as "good" at the time of surgery for injuries suffered in an automobile accident two years earlier. His only physical problem seemed to be a moderate obesity.

4. The smoke inhalation which Mr. Morrow suffered at the scene of the fire along with the stress and strain of the event undoubtedly precipitated the acute infarct. (4)

Examination by Drs. Dixon and Thompson of the Armed Forces Institute of Pathology and by Dr. Hughes of the National Bureau of Standards of the documents submitted by the attorney for the claimant have brought forth the following opinions:

1. Mr. Morrow was suffering from marked coronary arteriosclerosis before his cardiac arrest on 8 October 1976. The autopsy showed the presence of a previous, healed myocardial infarction. (6)

2. In 25% of the patients with coronary arteriosclerosis, death is the first indication of the presence of the disorder. (6)

3. A routine chest X-Ray does not show indications of coronary arteriosclerosis. (6)

4. Conornary arteriosclerosis is a chronic, progressive disorder and Mr. Morrow's disease was almost certainly more severe in 1977 at the time of his collapse, than it was in 1975 at the time X-Rays and other examinations were made prior to remedial surgery following his automobile accident. (6)

   A stenosis or blockage of 75% in the coronary arteries, as revealed in the autopsy, is very significant disease and requires some years to reach such a level. (4)

5. The erythema and bright red blood in the posterior oral pharynz along with wheezing noises over the neck and throat, as noted by Dr. Stamps in his October 8 examination of Mr. Morrow, could well have resulted from the placement of an endotracheal tube into the trachea as part of the resuscitation process after cardiac arrest. This is a routine procedure. (7)

6. Although cardiac irregularities are described in association with carbon monoxide intoxication, none of the cases seen by LEAA's expert consultants has had an acute myocardial infarction precipitated by exposure to carbon monoxide. (4)

7. The heart of Mr. Morrow, which weighed 480 grams, was heavier than the normal 350 grams. This suggests a continuing degree of increased demand on the heart, most likely due to hypertension or high blood pressure. The blood pressure recorded on 8 October 1976 was, in fact, 128/108, which qualifies as diastolic hypertension. (4)

8. Mr. Morrow had a history of cigarette smoking and obesity, both factors which contribute to coronary disease. (4)

9. The behavior of Mr. Morrow following the probable onset of his cardiac arrest — falling down stairs, loss of memory "For the rest of the day," living for an additional six weeks — suggests that the amount of smoke inhaled was sufficient to cause real problems on a purely respiratory basis. His symptoms were primarily cardiac with chest pain and collapse. (4)

10. Had the smoke contained significant quantities of a) carbon monoxide; b) liberated freon; c) smoke from other unidentified burning materials, Mr. Morrow would have experienced the following symptoms:

    A. *Carbon monoxide:* nearly always the cause of deaths attributed to "smoke inhalation." Since no measurements were made of the carboxyhemoglobin content of Mr. Morrow's blood immediately after the fire, it is extremely difficult to associate subsequent events with exposure to various levels of carbon monoxide. A person in good health may be exposed to concentrations of carbon monoxide sufficiently high to cause loss of consciousness and yet recover completely if removed from the contaminated atmosphere. (8)

A person suffering from a heart condition may suffer serious consequences when exposed to concentrations of carbon monoxide from which a normally healthy person would recover without after effects. (8)

It can be assumed from this evidence and from the information contained in the referenced publications, that Mr. Morrow did inhale sufficient carbon monoxide to block off consciousness of his activities following his exit from the fire room, but since he later recovered full consciousness, and no edema was reported by Dr. Sterne at the time of examination in the emergency room (2) it can be assumed further that the effects of the carbon monoxide on his body were not sufficient to cause real respiratory problems. (4)

B. *Freon:* non-toxic to humans even at high dosage and after prolonged exposure. When brought into contact with hot metallic surfaces and a moist atmosphere, freon decomposes into other gases, the most common of which is phosgene. If a person is exposed to a physiologically significant concentration of phosgene, he at first notices little discomfort but the gase hydrolyzes in the lungs where the resulting hydrochloric acid produces inflammation and subsequent pulmonary edema with death usually resulting in 4 to 24 hours. (8)

From this evidence it can be concluded that any possible leakage of freon from the air-conditioner was insufficient to have affected Mr. Morrow's lungs since he did not at any time suffer from the symptoms associated with inhalation of freon-related gases.

C. Smoke from other, unidentified burning materials: The types of material, amounts combusted and level of ventilation in the bedroom during the fire were unknown. It is not possible to estimate the contributions made to the smoke from the burning plastic blinds, carpet, etc.

However, ". . . in spite of the wide variety of potentially toxic materials generated in fires, carbon monoxide is almost always the cause of death when death occurs through 'smoke inhalation'." (8)

11. The cause of John C. Morrow's death was the underlying chronic, progressive, cardiovascular disease which is specifically atherosclerosis of the coronary arteries. In the presence of such pre-existing severe disease, the fatal outcome could have occurred at any time - as the result of a large meal, straining at stool, minimal exercise or perhaps even at rest. (4)

Conclusion

Based upon the preceding considerations, it is my finding that, although Mr. Morrow probably inhaled enough carbon monoxide to have blocked out his memory of events following his departure from the bedroom in which the fire was located, and to have caused cardiac irregularities which contributed to the onset of cardiac arrest, the actual cause of death was the chronic, progressive, cardiovascular disease. Smoke inhalation effects were secondary and minor in comparison with the damage offered by the underlying, chronic disorder and did not, therefore, promote a "traumatic injury" in this case. This opinon is supported by the substantial evidence quoted above which is explained more fully in the appended references. This opinion is concurred with by the LEAA Office of General Counsel. (9)

It should also be noted that, as noted by claimant's attorney, benefits would also be payable under PSOB in the cases coming

under the provisions of Section 32.4 of the Regulations which provides that:

> "The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit."

In considering the applicability of this section to the current case, consideration has again been given to PSOB Legal Opinion 77-6 cited above. Specifically, this opinion indicates that "although. . . two doctors looking at the same evidence can render two different opinions . . . . A determination was made on the basis of 'substantial evidence,' (e.g., 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *NIRS,* 805, U.S. 197, 229, (1938)), should survive an appeal, even if a different conclusion may be drawn by another reader." See Davis, Administrative Law Treatise, §29.01, *et seq.* The memo further states that "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission,* 383, U.S. 607, 620, (1966).

Since the evidence clearly supports the conclusion that death resulted from combined multiple factors (including the weakened heart condition and the impact of smoke, stress, strain, and anxiety on the pre-existing cardiac condition) - rather than from a particular "traumatic injury" incurred during the fire, it is my view that there is no reasonable doubt as to whether a traumatic injury was a substantial factor in the death and that consequently the case does not come within the provisions of Section 32.4. Therefore, this Section does not constitute the basis for reversal of the original determination.

Accordingly, it is hereby determined that the original LEAA determination should be upheld and that claimant's request for reversal thereof should be denied.

8/15/78 — /s/ June R. Cornog, Ph. D.
Date — Hearing Officer, PSOB

LIST OF REFERENCES

1. Administrative Hearing Record in re: John C. Morrow, Fire Fighter, Beverly I. Morrow, Claimant, dated 24 May 1978.

2. Consultation Record, dated October 8, 1976, signed by Thomas E. Stamps, M.D.

3. Hospital Record, dated August 12, 1975, signed by John H. Sterne, M.D.

4. Letter, dated 13 June 1978, signed by Dr. Douglas S. Dixon, of the Armed Forces Institute of Pathology (AFIP).

5. Letter, dated 26 July 1978, signed by Dr. Douglas S. Dixon, AFIP.

6. Letter #1, dated 14 June 1978, signed by Dr. Robert L. Thompson, Captain, MC, USN, AFIP.

7. Letter #2, dated 14 June 1978, signed by Dr. Robert L. Thompson, Captain, MC, USN, AFIP.

8. Letter, dated 27 July 1978, signed by Ernest E. Hughes, Research Chemist, Gas and Particulate Science Division, Center for Analytical Chemistry, National Bureau of Standards, U.S. Department of Commerce.

9. Memorandum, dated 8 August 1978, signed by Charles A. Lauer, Deputy General Counsel, Office of General Counsel, LEAA, U.S. Department of Justice.

General Reference List

10. Marx, J.L. and Kolata, G.B., *Combatting the #1 Killer, The SCIENCE Report on Heart Research,* The American Association for the Advancement of Sciences, 1978.

11. Ives, J.M., Hughes, E.E., and Taylor, J.K., *Toxic Atmospheres Associated with Real Fire Situations,* National Bureau of Standards Report No. 10 807, dated February, 1972.

12. Terril, J.B., Montgomery, Ruth R., Reinhardt, C.F., Toxic Gases from Fires, *Science,* 23 June 1978, Volume 200, No. 4348.

13. National Air Pollution Control Administration, Department of Heath, Education and Welfare, *Air Quality Criteria for Carbon Monoxide,* Publication No. Ap-72, dated March, 1970.

14. Public Health Service, Center for Disease Control, National Institute for Occupational Safety and Health, U.S. Department of Health, Education and Welfare, *Criteria for a Recommended Standard. . . . Occupational Exposure to Phosgene,* 1976, HEW publication No. (NIOSH) 76-137.

15. Henderson, Y., and Haggard, H.W., *Noxious Gases and the Principles of Respiration Influencing their Action,* Second Edition, American Chemical Society Monograph, Reinhold Publishers, N.Y., 1943.

APPENDIX D

Public Safety Officer's Benefits
Program (PSOB)

Office of General Counsel (OGC)

PSOB Legal Opinion No. 77-6—Traumatic Injury as Substantial Factor in Deaths Due to Heart Attack

You have asked this office to clarify the meaning of the term "substantial factor" as it applies to the relationship between a traumatic injury and the cause of a public safety officer's death. The term is used in the Commentary on Section 32.2(e) of the LEAA PSOB Regulations, 28 C.F.R. §32.1, *et seq.*, as follows:

> "The definition of 'personal injury' in the legislative history of PSOB, and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude that deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death.
>
> "Where, for instance, LEAA determines the cause of death to by myocardial infarction resulting from a coronary thrombosis, no benefit will be paid unless the claimant can demonstrate a substantial causal connection between a traumatic injury and the thrombosis. Similarly, where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and died of a 'heart attack,' a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death."

The regulation reflects the intent of Congress in determining when an officer's death should be considered "the direct and proximate result of a personal injury sustained in the line of duty." The House Judiciary Committee Reports on the firefighters' and public safety officers' benefits bill that were eventually joined as

the Public Safety Officers' Benefits Act of 1976 stated that the "direct and proximate result" requirement was intended to cover "those cases where the personal injury is a substantial factor in bringing about the officer's death." House Reports No. 94-1031 and 94-1032 (94th Cong., 2nd Sess.), at pp. 4 and 5, respectively.

Generally, you should consider a traumatic injury a "substantial factor" in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death: or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive disease.

In either situation, there must be sufficient medical, physical, or testimonial evidence to support the determination. Where the evidence is conflicting, the medical evidence should be given the greatest weight. Your conclusion should not be based on a remote medical posibility that is not supported by the facts developed at autopsy or by the officer's medical history. Even where the remote theory propounded by the claimant is consistent with the evidence in the file, it should not be accepted if the medical examiner, and the AFIP pathologists reviewing the file, believe the evidence reasonably supports a different conclusion.[1] Where there is a reasonable doubt as to causation, the death should be covered and the benefit paid. 28 C.F.R. §32.4.

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[1] "Proof that employment was not a medical cause of a heart attack can be provided in several ways. There may be direct physical evidence, perhaps afforded by an autopsy, negating the existence of any new heart lesions or pathology. There may also be medical opinion evidence denying the causal connection. In such cases, under familiar rules, an appellate court will not disturb a denial of compensation. Or the medical testimony on which the claim rests may be too speculative or weak to meet the claimant's burden of proof. In fact, the medical situation may sometimes be impossible to analyze. In such a case, if unaided by evidence connecting the injury with th employment, the claim may fail." Larson, "The 'Heart Cases' in Workmen's Compensation: An Analysis and Suggested Solution," 65 Michigan Law Review 441, 475 (1967) (footnotes omitted).

As the preceding discussion implies, two doctors looking at the same evidence can render two different opinions. However, a determination mad on the basis of "substantial evidence," i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938), should survive an appeal, even if a different conclusion may be drawn by another reader. See Davis, Administrative Law Treatise, §§29.01, *et seq.* "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

Although your office's decision may, therefore, be a subjective one, it is likely to be upheld if made within the framework of the legal principles set forth in the regulations and this memorandum, and based on the testimonial, physical, and medical evidence assembled in the case file.

Thomas J. Madden
Assistant Administrator
General Counsel

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No. 81-119

In the Supreme Court of the United States

OCTOBER TERM, 1980

BEVERLY MORROW, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF JANE ELLEN MORROW AND JAMES ANDREW MORROW, AND JOHN PATRICK MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the procedures employed by the Law Enforcement Assistance Administration (LEAA) afford claimants for death benefits under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. (& Supp. III) 3796 *et seq.*, an adequate opportunity to respond to adverse evidence received after the conclusion of the oral hearing on their claim.

2. Whether in denying petitioners' claim the LEAA followed a regulation requiring that any reasonable doubt be resolved in favor of the claimant.

3. Whether the denial of petitioners' claim was predicated upon an erroneous interpretation of one of the governing regulations.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-8) is reported at 647 F. 2d 1099. The decision of the Law Enforcement Assistance Administration (LEAA) hearing officer denying petitioners' request for reconsideration is reprinted at Pet. App. A-16 to A-29.

JURISDICTION

The judgment of the Court of Claims was entered on April 22, 1981. The petition for a writ of certiorari was filed on July 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. The Public Safety Officers' Benefits Act of 1976 (PSOBA), 42 U.S.C. (& Supp. III) 3796 *et seq.*, provides for the payment of a $50,000 death benefit to the survivors of

any "public safety officer [who] has died as the direct and proximate result of a personal injury sustained in the line of duty * * *." 42 U.S.C. (& Supp. III) 3796. Under regulations promulgated by the Law Enforcement Assistance Administration (LEAA), a "[p]ersonal injury" is defined as a "traumatic injury" or a disease resulting from such an injury, but not an "occupational disease[]." 28 C.F.R. 32.2(e). A "traumatic injury," in turn, is defined to include a bodily condition caused by "climatic conditions," such as "dense smoke." 28 C.F.R. 32.2(f); 42 Fed. Reg. 23260 (1977). The effects of "stress and strain," however, are expressly excluded from coverage (*ibid.*).

The regulations also provide that an injury is a "[d]irect and proximate" cause of death if it is a "substantial factor" leading to death (28 C.F.R. 32.2(d)), and LEAA has determined that an injury will be considered a "substantial factor" if the injury alone is sufficient to kill an officer, regardless of health, or if the injury contributes to the officer's death as much as any other factor, such as a pre-existing disease. PSOBA Legal Opinion No. 77-6 (Pet. App. A-31). A claimant bears the burden of showing that an injury was a "substantial factor" in the officer's death (42 Fed. Reg. 23260 (1977)), but the regulations also provide that "any reasonable doubt arising from the circumstances of the officer's death" must be resolved in the claimant's favor. 28 C.F.R. 32.4.

When a PSOBA claim is filed, LEAA procedures require that the file be submitted to a forensic pathologist for review and that the opinion of other pathologists and cardiologists be solicited "if appropriate." 42 Fed. Reg. 23260 (1977). If the claim is denied, the claimant may request an oral hearing and may submit evidence relevant to eligibility. 28 C.F.R. 32.24(a) and (c). The hearing officer is required to receive all relevant evidence proffered by the claimant, as well as "such other evidence as the hearing officer may

determine to be necessary or useful in evaluating the claim." 28 C.F.R. 32.24(c). See also 28 C.F.R. 32.21(a). The hearing officer is authorized to reopen the hearing at any time prior to decision for the receipt of additional relevant and material evidence. 28 C.F.R. 32.24(e). If the hearing officer determines that a claimant is ineligible, the claimant may obtain review of that determination by the LEAA Administrator. 28 C.F.R. 32.24(a).

2. On October 8, 1976, John C. Morrow, a firefighter in Evansville, Indiana, became ill after inhaling smoke while fighting a house fire. After a short period, he resumed fighting the fire and then returned to the fire station and collapsed. He was taken to a nearby hospital, where his condition was diagnosed as cardiac arrest. He remained hospitalized for three and one-half weeks before being discharged. On November 16, he was readmitted after suffering severe chest pains at home, and he died in the hospital four days later (Pet. App. A-4 to A-5). An autopsy revealed evidence of an earlier, healed myocardial infarction, and resulted in a diagnosis of marked atherosclerotic heart disease (R. 137).[1] The death certificate listed the immediate cause of death as cardiac arrest due to myocardial infarction (R. 136).

Petitioners, who are Morrow's wife and children, then filed a claim for PSOBA benefits. LEAA sent the medical information in the file to a forensic pathologist, Dr. Robert L. Thompson of Walter Reed Hospital, who concluded that Morrow's death had resulted, not from a traumatic injury, but from an "acute myocardial infarct secondary to arteriosclerotic heart disease" (R. 144). LEAA then issued its initial determination of ineligibility, in which it concluded that Morrow's smoke inhalation was not a substantial factor in his fatal heart attack and that the "overriding factor in

[1] "R" refers to the administrative record.

his death was his severe underlying heart disease" (R. 134-135). Petitioners requested reconsideration of the denial, and an oral hearing was held. At the hearing, petitioners objected to the consideration of reports by physicians who had not treated Morrow, but they did not seek to subpoena Dr. Thompson or the pathologist who performed the autopsy (R. 75-77). Following the hearing, the record was held open for the receipt of additional evidence submitted by petitioners (R. 29-33, 46-63), as well as additional analyses by two medical advisers and a chemical expert whose views were solicited by the hearing officer (Pet. App. A-5; R. 23, 26, 40).

The hearing officer subsequently issued a decision (Pet. App. A-16 to A-29) denying benefits and finding that there was no reasonable doubt that a traumatic injury incurred during the fire had not been a substantial factor in Morrow's death (*id.* at A-27). At petitioners' request, their claim was reviewed by the LEAA Administrator, who adopted the hearing officer's decision as the final agency action (Pet. App. A-7; R.1).

Petitioners then filed suit in the Court of Claims under the Tucker Act, 28 U.S.C. (& Supp. III) 1491. The court granted summary judgment in favor of the government (Pet. App. A-1 to A-8). It found that there was no reasonable doubt that smoke inhalation had not been a " 'substantial factor' " in Morrow's death "under any plausible construction of the term ['substantial factor']" (*id.* at A-7 n.4) and held that petitioners' constitutional claims were "without substance" (*id.* at A-8 n.5).

ARGUMENT

Petitioners seek review of the denial of their claim for benefits on various grounds. Their arguments, however, are based upon a clear misreading of the relevant regulations and the decision below. Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 10-18) is that the procedures used by the LEAA to determine eligibility for PSOBA benefits violate due process because they permit the hearing officer to solicit and receive medical reports and other evidence after the conclusion of the oral hearing (28 C.F.R. 32.24(e)) but do not afford claimants a meaningful opportunity to respond to adverse evidence received at that time. In fact, however, such an opportunity is and always has been provided.

When the hearing officer determines that benefits should be denied, a claimant has always been able to obtain review by the LEAA Administrator and to submit new evidence or advance new arguments. At the time when petitioners sought review by the Administrator, the commentary to the regulation governing review, 28 C.F.R. 32.24, stated that the review process was "informal and expedited" and was "intended to minimize the financial and logistical burden on the claimant, *yet provide a fair hearing of his views.*" 42 Fed. Reg. 23261 (1977) (emphasis added). Since then, the regulation itself has been amended to provide that a claimant seeking review by the Administrator can "[c]omment on the record, and offer new evidence or argument on the issues in controversy." 28 C.F.R. 32.24(i)(2). This amendment did not afford claimants new rights but was promulgated "to conform to the agency's actual practice." 45 Fed. Reg. 16180 (1980).

Thus, petitioners had the opportunity to respond to the evidence received by the hearing officer after the conclusion of the oral hearing,[2] but they did not do so. They were given

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[2]Petitioners contend (Pet. 10-18) that the decision below conflicts with the following decisions of this Court concerning due process rights: *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Morgan* v. *United States*, 304 U.S. 1 (1938); and *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937). But since their arguments are

"the opportunity to be heard 'at a meaningful time and in a meaningful manner' " (*Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)), and, consequently, their right to due process was not denied.[3]

2. Petitioners also argue (Pet. 18-22) that LEAA failed to follow its own regulation requiring that "any reasonable doubt arising from the circumstances of the officer's death" be resolved in the claimants favor. 28 C.F.R. 32.4. They contend (Pet. 20) that the Court of Claims recognized that a reasonable doubt existed in this case. Petitioners, however, have simply misread the court's opinion.

After noting petitioners' argument, the Court of Claims remarked:

> The allegation, relating to the agency's finding upon the issue of proximate causation, is again without foundation. There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence. The obvious and overwhelming cause of death was heart disease—pre-existing, prolonged, and degenerative.

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predicated upon the erroneous assertion that they had no opportunity to respond to evidence received after the oral hearing, a discussion of these cases is unnecessary.

Petitioners also maintain (Pet. 12) that the decision below conflicts with several decisions of the courts of appeals holding that the denial of Social Security disability benefits is unjustified when supported only by the opinion of a single physician who did not treat the claimant and when all the other evidence was to the contrary. Those cases are inapposite here, however, because LEAA's decision was supported, not only by the reports of experts who reviewed the file, but also by the findings of the pathologist who performed the autopsy.

[3]Petitioners suggest (Pet. 8, 13) that the experts whose reports were solicited by the hearing officer after the oral hearing were not furnished with copies of petitioners' post-hearing evidence. The record, however, refutes this claim (see R. 26, 40).

(Pet. App. A-8) (emphasis in original) (footnote omitted).

Petitioners interpret (Pet. 20) the court's statement—" 'There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence' "—to mean that a reasonable doubt existed. When that sentence is read in context, however, it is clear that the court meant precisely the opposite, *i.e.*, that any contention that the smoke inhalation substantially contributed to Morrow's death would be unreasonable. Thus, even under the lenient standard in 28 C.F.R. 32.4, petitioners did not qualify for death benefits.[4]

3. Finally, petitioners contend (Pet. 22-25) that LEAA has adopted an erroneous definition of the term " 'substantial factor,' " which is used in 28 C.F.R. 32.2(d) to define the statutory phrase "direct and proximate result." 42 U.S.C. (& Supp. III) 3796(a). In a legal opinion, LEAA's general counsel has stated that an injury should be considered a " 'substantial factor' in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death[;] or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive disease." PSOBA Legal Opinion No. 77-6 (Pet. App. A-31).

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[4]Petitioners focus (Pet. 19) upon a portion of the opinion of the lay hearing officer (Pet. App. A-27) that appears to rely upon the standard of review applicable when a final agency action is reviewed in court, *i.e.*, whether the agency's action is supported by substantial evidence (see 5 U.S.C. 706(2)(E)). But even if the hearing officer erroneously believed that the standard was relevant to the proceedings before her, her error did not affect the decision, because she also applied (Pet. App. A-27) the correct standard set out in 28 C.F.R. 32.4 and found that there was no reasonable doubt that a traumatic injury had not caused Morrow's death. Furthermore, as noted above, the Court of Claims clearly applied the correct standard and reached the same conclusion (Pet. App. A-8).

LEAA relied upon this definition of " 'substantial factor' " in denying petitioners' claim (Pet. App. A-19 to A-20), but the Court of Claims did not. The court described that definition as "somewhat cramped,"[5] but held that it need not resolve the question because "we do not believe that claimants herein can prevail under any plausible construction of the term" (*id.* at A-7 n.4). Thus, the denial of petitioners' claim did not result from the LEAA's interpretation, and review of the correctness of that interpretation is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Despite this criticism, LEAA's interpretation of its own regulation is clearly valid. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

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No. 81-119

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

BEVERLY MORROW, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF JANE ELLEN MORROW AND JAMES ANDREW MORROW, AND JOHN PATRICK MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED BY THE GOVERNMENT'S BRIEF IN OPPOSITION

1. Whether the fact that after the administrative hearing in this case, the applicable regulations were amended to provide that claimants for Public Safety Officer's Benefits may reopen the record to respond to evidence received by the hearing officer ex parte, after the hearing, eliminated the violations of the due process rights of petitioners by the LEAA in this case?

2. Whether the "actual practice" of the LEAA prior to these amendments conformed to the requirements of the amended regulations that provided that claimants for Public Safety Officer's Benefits be afforded an opportunity to reopen the record to respond to such evidence?

3. Whether the findings of the pathologist who performed the autopsy contains any opinion on the crucial issue of whether or not the smoke inhalation sustained by Firefighter John Morrow was a "substantial factor" in his death which supports the decision of the LEAA's hearing office to deny Public Safety Officer's Benefits to his widow and dependent children?

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In the Supreme Court of the United States

October Term, 1980

No. 81-119

Beverly Morrow, Individually and as Parent and Next Friend of Jane Ellen Morrow and James Andrew Morrow, and John Patrick Morrow, Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONERS

ARGUMENT

The petitioners limit their argument in this reply brief to those arguments first raised in the "Brief for the United States in Opposition" and which were not discussed in the Petition for Writ of Certiorari, as required by Rule 22.5 of this Court.

ISSUES ONE AND TWO

The Government's admission that the applicable regulations, 28 C.F.R. Section

32, were amended subsequent to the LEAA's decision to deny benefits to the widow and minor dependent children of Firefighter Morrow in this case is a compelling reason for granting the Writ. As the Government states in its brief (Gov. Br. 5), the regulations now provide procedures by which claimants for Public Safety Officer's Benefits can reopen the record to respond to evidence received post-hearing and ex parte by the hearing officer. However, the Government's self-serving argument that this amendment did not change the "actual practice" of the agency is contradicted by the record in this case. In fact, it is clear that the hearing officer in reaching her decision to deny benefits in this case relied on the opinions of Drs. Dixon and Thompson that were set forth in the June 13, 1978 letter of Dr. Dixon and June 14, 1978 letter of Dr. Thompson. Both of these opinions were rendered by these men prior to the time they received all of the evidence submitted by petitioners. The record is undisputed that the hearing officer did not rely on opinions of these men rendered after they received all of the material submitted by petitioners. (Record 8-20).

It is undisputed and the Government has conceded in its brief, that at the time of the decision by the agency in this case the regulations did not provide a procedure by which petitioners could meaningfully respond to the post-hearing evidence received by the hearing officer.

Further, at no time were petitioners or their counsel invited by the Agency to

reopen the record or submit evidence contrary to the opinions of the non-treating physicians, which, according to the Government's brief, was the "actual practice" of the agency.

Therefore, the "actual practice" of the agency in this case did violate the due process rights of petitioners by failing to provide them a meaningful opportunity to respond to the evidence received by the hearing officer after the hearing.

ISSUE THREE

The Government's attempt to rebut petitioners' contention that the decision below conflicts with the decision of this Court in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, (1971) and with the decisions of a number of Federal Courts of Appeal (Pet. p. 12) on the ground that the LEAA's decision was supported by the findings of the pathologist who conducted the autopsy, is a distinction without substance. This pathologist never treated Mrs. Morrow's husband and it is undisputed that every physician who did treat Mr. Morrow was of the opinion that the smoke inhalation he suffered was a "substantial factor" in his death.

Further, the "List of References" used by the hearing officer to support her decision to deny benefits to petitioners (R. 19) does not list the pathologist's record of autopsy as a source upon which she relied in reaching her decision. The only references to the autopsy are in Dr. Thompson's letter to the hearing officer

of June 14, 1978, (R. 41) in which he states that Firefighter Morrow's coronary arteriosclerosis was "well documented by autopsy," and in Dr. Dixon's letter of June 13, 1978, that states he considered the autopsy report in formulating his opinion. (R. 43).

Most important, the autopsy report itself (R. 137-140) states no conclusion or opinion whatsoever on the part of the pathologist in regard to whether or not smoke inhalation was a "substantial factor" or cause of Firefighter Morrow's death.

Clearly, the "findings of the pathologist who performed the autopsy" not only was not an opinion of a treating physician on the critical issue in this case, but also was not relied upon by the hearing officer in reaching her decision. Therefore, the Government's statement in Footnote 2 of its brief (Gov. Br. 6) that the "LEAA's decision was supported, not only by the reports of experts who reviewed the file, but also by the findings of the pathologist who performed the autopsy." is misleading and contrary to fact.

The contention of the Government that the Court of Claims "meant precisely the opposite" of what it said in its opinion in this case (Br. in Opp. 7) has already been discussed in the Petition at pages 20-22 thereof.

CONCLUSION

The Government has not shown any justification or excuse for the serious violations of the due process rights of the petitioners by the administrative agency in this case. Therefore, a Writ of Certiorari should issue to review the judgment and the opinion of the United States Court of Claims in this case.

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